Neutral Citation Number: 2020] EWHC 2277 (QB)

Case No: E85YJ201/BM90201A

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY
On appeal from the County Court of Lincoln
Order of HHJ Owen dated 27 September 2019
COUNTY COURT NO: E85YJ201
APPEAL REF: BM90201A

Birmingham Appeal Centre
Priory Courts, 33 Bull Street,
Birmingham B4 6DS

Date: 20/08/2020

Before :

MR JUSTICE MARTIN SPENCER

- -

Between :

MR CHRISTOPHER HOLMES	**Claimant/ Appellant**
- and –	
S & B CONCRETE LIMITED	**Defendant/ Respondent**

- -

Mr Daniel Penman (instructed by **Baker & Coleman**) for the **Claimant/Appellant**
Mr Michael Kent QC (instructed by **DWF Law LLP**) for the **Defendant/Respondent**

Hearing dates: 27 July 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MARTIN SPENCER

Covid-19 Protocol: this judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10.30am on 20 August 2020.

MR JUSTICE MARTIN SPENCER :

Introduction

1. With permission of Soole J, the Claimant appeals against the decision of HHJ Owen QC dated 27 September 2019 whereby he dismissed the Claimant's claim for noise-induced hearing loss ("NIHL").

2. The issue in this case is whether the learned judge erred in failing to find that, the Respondent having been deemed to have been in liquidation continuously since 1995, limitation did not run between 1995 and 4 May 2018, applying *Financial Services Compensation Scheme Limited v Larnell (Insurances) Limited (in liquidation)* [2005] EWCA Civ 1408 (hereafter "*Financial Services*"), with the result that the action was not statute barred.

The background facts

3. The Claimant was employed by the Defendant between approximately 1986 and 1993 as a joiner at their factory premises in Barnsley. He made this claim for alleged NIHL, supported by a medical report dated 14 November 2018 from a Consultant Otolaryngologist, Mr Verma.

4. The Defendant employer was dissolved on 19 August 1995 following the voluntary winding-up of the company pursuant to section 106 of the Insolvency Act 1986. On the judge's findings, the Claimant's date of knowledge for the purposes of the Limitation Act 1980 arose by at least mid-2007: by that date he was aware that he had suffered a significant hearing loss which he considered was (probably) attributable to the noisy working conditions of which he now complains.

5. On 13 August 2018, the Claimant applied by Claim Form for the restoration of the Defendant to the Register of Companies, clearly for the purposes of bringing this claim against the Defendant's insurers pursuant to the Third Party (Rights against Insurers) Act 1930. By order of District Judge Richmond sitting in the Manchester Business and Property Court, an order was made restoring the Defendant to the Register and ordering that the company do continue in creditors' voluntary liquidation. That application was served only on the Registrar of Companies, but not on the Defendant's insurers and was unopposed.

6. Prior to the restoration of the company to the Register the Claimant issued this claim for damages on 30 May 2018 and, on 20 August 2018, served Particulars of Claim alleging negligence and breach of statutory duty. At paragraph 9 it was pleaded:

> "The claimant will contend that their date of knowledge within the meaning of the Limitation Act 1980 occurred less than three years prior to the date of issue of these proceedings. In so far as it may be established that the claimant's date of knowledge occurred more than three years prior to the date of issue of these proceedings, the claimant will invite the court to exercise discretion pursuant to section 33 of the Limitation Act 1980 to allow this action to proceed. It would be equitable to do so in all the circumstances of the case."

7. By order of District Judge Corkill dated 18 February 2019, an order was made for the trial of a preliminary issue as to whether the claim was statute-barred and whether there should be an order under section 33 of the Limitation Act 1980 to disapply section 11. It was this preliminary issue that came before Judge Owen QC on 27 September 2019.

The judgment of HHJ Owen QC

8. The principal issues before the learned judge concerned the date of the Claimant's knowledge for the purposes of sections 11 and 14 of the Limitation Act 1980 and whether he should exercise his discretion to disapply the limitation period under section 33 of the Act. For reasons which it is unnecessary to consider for the purposes of this judgment, the learned judge decided that the Claimant's date of knowledge was mid-2007 and that it would not be equitable for him to exercise his discretion to disapply the limitation period pursuant to section 33. There is no appeal against that part of the judgment.

9. However, in his skeleton argument below on behalf of the Claimant, Mr Penman relied upon a further, separate argument: this was that the effect of restoration of the company to the Register was retrospective and the Defendant was therefore deemed to have been in creditors' voluntary liquidation since at least 17 May 1995. Relying upon *Financial Services* in which was held that "if [a claim] is not time-barred at the commencement of the bankruptcy or winding-up, it does not become time-barred by the passage of further time thereafter," he argued that, in order for the case to be statute-barred, the Claimant would have had to have had relevant knowledge for the purposes of the 1980 Act before 17 May 1992, that is, three years prior to the date since when the Defendant was deemed to have been in creditors' voluntary liquidation. On that basis, he argued that the claim was not statute-barred. Mr Penman renewed that argument orally before Judge Owen QC.

10. In response, counsel for the Defendant in the court below, Mr Eccles, submitted that the decision in *Financial Services*, if applied to the facts of this case or any similar case (which is very common) would produce the remarkable and hitherto unknown outcome that whatever inequitable conduct by a claimant, the defendant would have no means of challenging the claim on the grounds of limitation. He submitted that *Financial Services* could and should be distinguished and that the appropriate approach is that identified in the decision of the Court of Appeal in *Smith v White Knight Laundry Limited* [2002] 1 WLR 616. Following that case, the approach which would do justice between the parties was to determine the two issues – limitation and restoration of the company to the Register – concurrently so that if, as was the case, it appeared that the merits of the section 33 issue were against the Claimant, the court could refuse to restore the company to the register and refuse to disapply section 11.

11. Rejecting the additional argument on behalf of the Claimant, the learned judge said:

> "28. I am not persuaded by Mr Penman that the decision in *Financial Services* has that effect in light of the facts of this case. I am satisfied that different considerations arise in this case and in 'personal injury claims' (see *Financial Services* at paragraph 28). Mr Eccles drew attention in his submissions to section 1030(3) and section 1032(3) of the 2006 Act.

These provisions are similar in effect to the statutory provisions applicable in *Smith v White Knight* (section 651 (5) and (6) of the 1986 Act). That is, when considering the application to restore in the present case the court was bound ('shall') have regard to its power to make such directions which protect the rights or position of any person who might be affected by the proposed order for restoration (that is, the defendant or his insurer). Furthermore, I accept Mr Eccles' submission that this court in dealing with different statutory provisions concerning limitation to those which applied in *Financial Services*, namely section 14A and 14B. In the present case, a personal injury claim, the court is directly engaged by the operation of sections 11, 14 and in particular 33 which specifically require the court to determine the question of whether it would be equitable to disapply section 11, in light of section 14. In assessing the balance of prejudice and that which is equitable, the court is concerned with wider considerations than those in, for example, *Financial Services*. In my judgment the correct approach, certainly consistent with the overriding objective, is essentially that set out in *Smith v White Knight Laundry*, albeit involving different statutory provisions which are not material for present purposes. This approach might also be supported by the propositions suggested by Mr Eccles to the effect that this is a claim that concerns the benefits of an employer's liability policy, that is which is subject to the compulsory statutory provisions and which is ring-fenced to respond to this very claim. But I am content to determine the application before me on the basis that, this being a personal injury claim, in which the cause of action accrued pursuant to section 11 at or about the time of the alleged exposure at work (long before the voluntary winding-up and dissolution in 1992) and where the claimant had acquired relevant knowledge within the meaning of section 14 as long ago as mid-2007 and yet, for reasons not explained satisfactorily to the court, the claimant (wilfully) delayed bringing his claim until mid-2018 having given notice by letter of claim two years earlier, different considerations do apply and the court is not bound to apply the principle relied upon in *Financial Services*. Standing back it is not surprising that this argument has not been previously raised by personal injury practitioners or that counsel in the short time available apparently to them had been unable to discover any other decision which would support or make good that broad proposition which underpins the claimant's application.

29. I am satisfied that having regard to the merits of this case (or rather the clear lack of merit in the claimant's case on limitation) for the reasons given earlier the potential issue of limitation clearly ought to have been raised on the application to restore. If so, it is highly likely that the court would have required the defendants or their insurers to have been served

> and permitted to attend and at least set out their position. In those circumstances the court would have been unlikely simply to order that the company be restored to the Register without hearing the parties' positions on making appropriate directions under section 1030 (3) and section 1032 (3) for otherwise the order would have had retrospective effect as Mr Penman submitted. In the event, the claimant's case on limitation has been shown to be wholly without merit and it is difficult to see on what basis the court could or would in such circumstances have acceded to the application to restore the name to the Register to allow such a claim to be brought. It is no answer simply to say that since time stopped running upon or for the purposes of liquidation in 1995 the fact that the claimant's case on limitation was without merit is irrelevant. It is directly relevant when the court's power to restore the company's name to the Register is invoked. The statutory provisions within the Insolvency Acts and Companies Act ensure that, in personal injury cases, in an application to restore, the rights or position of the company and their employer's liability insurers are considered and that just directions and provision are made. That jurisdiction, invoking principles of fairness, is comparable to the principles of equity which are invoked in a section 33 application. If in a clear case, as this, it would be unjust to restore without regard to the position of the defendant, the court has the power to which I have earlier referred to make such order as is just in the circumstances. In this case, for the reasons given, it would not be just to allow this claim to proceed. Strictly, the order to restore requires to be set aside. It would be just and convenient however simply, as in *Smith v White Knight Laundry*, to dismiss the claim for the reasons given."

The Claimant's submissions on appeal

12. On this appeal, Mr Penman argues that the learned judge was wrong not to have found that the claim was not statute-barred because time had not run since the Defendant went into creditors' voluntary liquidation in 1995. He referred to the principle in *Re General Rolling Stock Company* [1872] LR 7 Ch App 646 as applied in *Financial Services*. *General Rolling Stock* is authority for the general proposition that once a company enters into liquidation, limitation periods cease to run and, in *Financial Services*, the Court of Appeal held that, subject to certain limitations, the "normal principles" are that if a claim is not time-barred at the commencement of the liquidation it does not become time-barred thereafter. He argued that by virtue of the order of District Judge Richmond of 8 November 2018 and section 1032(1) of the Companies Act 2006, the Defendant in this case is deemed to have been in liquidation since 1995 and therefore limitation had not expired. He distinguished *Smith v White Knight* on the basis that that case was about dissolution without liquidation so that there was no bar to limitation running when the company was dissolved. In that case the claimant permitted by section 651(6) of the Companies Act 1985 (which has been repealed but an equivalent provision appears in section 1030 (2) and (3) of the

Companies Act 2006) to make an application for a declaration that the period between dissolution and restoration should not count towards limitation. However, no such application was required in the instant case because the effect of section 1032(1) of the 2006 Act is automatic and retrospective with the result that section 1030(2) did not prevent the making of an order. Finally, he submitted that it was expressly held in the *Financial Services* case that an insurance policy is not to be treated as falling outside the liquidation because a claimant must establish liability against the insured prior to having a right against the insurer. He submitted there is no basis for distinguishing the present case from the *Financial Services* case on this point.

13. In his oral submissions, Mr Penman gave an example which, he submitted, exposed an inconsistency and an injustice in the decision of Judge Owen QC, thus indicating that his decision cannot have been right. He postulated two claimants, one whose claim is in time (Claimant A) and one whose claim is out of time (Claimant B). Supposing Claimant A applied to restore the company to the Register, which he could do without giving notice to the insurers. Given that his claim would be in time, that application would succeed. However, the company having been restored to the Register, Claimant B, whose claim was out of time, could then sue the defendant because it had been restored to the Register and the court would have no discretion to set aside the restoration on the application of the defendant's insurers in relation to claimant B's claim. That would, he argued, create an inconsistency and an injustice.

The Defendant's submissions on appeal

14. Mr Michael Kent QC on this appeal sought to uphold the decision of Judge Owen QC and relied in particular on the decision of the Court of Appeal in *Smith v White Knight Laundry*. He submitted that the power to restore a company to the Register is discretionary and is not to be exercised for the purpose of allowing a claim for damages for personal injury if it appears to the court that the claim would fail by reason of a limitation enactment and that, where the question of limitation is disputed (as where there is an issue as to date of knowledge or whether it would be equitable to allow the claim to proceed out of time) whether the company should be restored should not be determined unless and until those other issues have been resolved. Given that the learned judge had decided conclusively all limitation issues against the Claimant in this case, and there has been no appeal in that respect, he submitted that the approach of the learned judge was a proper one, namely to dismiss the claim rather than make provision for the order for restoration of the company to the Register to be set aside: doing justice between the parties, and pursuant to the overriding objective, the learned judge appropriately short-circuited the process and put the parties in the position they would have been in had the District Judge either imposed conditions on the restoration requiring the Claimant not to take advantage of any rule treating the limitation period as suspended in the interim or, as in *Smith's* case, by adjourning the preliminary issue to apply to have the restoration to the Register set aside.

15. Mr Kent further submitted that the learned judge was right to distinguish the *Financial Services* case, although not on the basis that this was a personal injury claim: he did not rely on any differences between the provisions of sections 14A and 14B on the one hand and sections 11, 14 and 33 on the other. He submitted that:

i) The claimants in the *Financial Services* case had "knowledge" of their cause of action for the purposes of sections 14A and 14B of the Limitation Act in 1997 which was before the company was wound up in 2000;

ii) The claimants in *Financial Services* had put in a proof of debt in August 2001 which had neither been admitted nor rejected by the liquidator;

iii) By contrast, the Claimant's date of knowledge in the present case was long after the Defendant company had been wound up and although he may have had an accrued cause of action for the injury to his hearing, he was unaware of it and therefore could not, practically, have lodged a claim with the liquidator then.

iv) In *Financial Services*, the policy of liability insurance to which the claimant intended to have recourse had a limit of indemnity of £250,000 while the claim itself amounted to £607,000;

v) By contrast, the claim in the present case relates to employers' liability in respect of which, at all material times, the Defendant was required to have compulsory insurance for which the minimum level of insurance required was £2,000,000;

vi) In those circumstances the factors relied upon by the court in *Financial Services* which were considered to make it impossible to see the claim as being one made "outside the liquidation" and not directed at property within the statutory trusts had no application to the present case.

Discussion

16. In my judgment, it is appropriate to take as a starting point the relevant provisions of the Companies Act 2006. These are:

> "1029 (1) An application may be made to the court to restore to the Register a company –
>
> a) That has been dissolved …
>
> b) That is deemed to have been dissolved ….
>
> Or
>
> c) That has been struck off the register ….
>
> 1030 (1) An application to the court for restoration of a company to the
>
> register may be made at any time for the purpose of -
>
> a) Bringing proceedings against the company for damages for personal injury;

> b) An insurer (within the meaning of the Third Parties (Rights against Insurers) Act 2010 bringing proceedings against a third party in the name of that company in respect of that company's liability for damages for personal injury.
>
> 2) No order shall be made on such an application if it appears to the court that the proceedings would fail by virtue of any enactment as to the time within which proceedings must be brought.
>
> 3) In making that decision the court must have regard to its power under section 1032(3) (power to give consequential directions etc) to direct that the period between the dissolution (or striking off) of the company and the making of the order is not to count for the purposes of any such enactment.
>
> …
>
> 1033(1) The general effect of an order by the court for restoration to the register is that the company's deemed to have continued in existence as if it had not been dissolved or struck off the register. …
>
> (3) The court may give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register."

It seems to me clear that, in enacting these provisions, parliament cannot have had in mind the effect of *Financial Services* or its predecessor, the *General Rolling Stock* case, as interpreted by the Claimant in the present case: otherwise, for a large number of cases such as the present, the restoration of the company to the Register would be automatic, the effect would be to mean that the limitation period had never run, and there would then be no need to direct that the period between the dissolution of the company and the making of the order to restore was not to count for the purposes of the Limitation Act. However, if Mr Penman is right as to the effect of restoration to the Register of a company which had been in liquidation, then whether or not Parliament can have had this effect in mind is neither here nor there.

17. In my judgment, Mr Kent QC is right that the decision of the Court of Appeal in *Financial Services* can and should be distinguished, and it does not have the effect contended for by Mr Penman. In that case, six investors alleged that the defendant company, their financial adviser, had given them negligent advice over a period of about three years but they did not acquire the relevant knowledge for the purposes of the Limitation Act until some eight years or so later. In the meantime, the defendant's shareholders had resolved to wind-up the company. The defendant was insured under an indemnity policy against liabilities to third parties and, as a consequence, the defendant's rights against its insurers under the indemnity policy were transferred to and vested in the investors as the third parties to whom the liabilities had been incurred pursuant to section 1 (1) of the Third Parties (Rights against Insurers) Act 1930. This provided:

> "Where, under any contract of insurance a person (hereinafter referred to as the Insured) is insured against liabilities to third parties which he may incur, then … (b) In the case of the

> Insured being a company, in the event of … a resolution for a voluntary winding-up being passed, with respect to the company … if, either before or after that event, any such liability as aforesaid is incurred by the Insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred.
>
> (4) Upon a transfer under subsection (1) … of this section, the insurer shall, subject to the provisions of section 3 of this Act, be under the same liability to the third party as he would have been under to the Insured, but … (b) if the liability of the insurer to the Insured is less than the liability of the Insured to the third party, nothing in this Act shall affect the rights of third party against the Insured in respect of the balance."

The six investors assigned their rights to the Financial Services Compensation Scheme which brought the claim in negligence against the defendant with a view to establishing the defendant's liability - as a preliminary to claiming against the insurers under the insurance policy. The defendant applied to strike out the claim on the ground that it was statute-barred. At first instance, the judge granted the application holding that, since the underlying claim was directed at the rights under the insurance policy, rights which were not available to the defendant's creditors generally, the claim had not been a liability at the time of the winding-up and therefore limitation periods had not ceased to run when the winding-up occurred. The claimant's appeal was allowed, it being held that, if successful, the Claimant's claim would establish the liability of the defendant to the claimant both for the purposes of triggering the claimant's rights under the 1930 Act to indemnity under the insurance policy and also for the purposes of any claim against the funds in the liquidation; that, so far as the claim in the liquidation was concerned, if the claim was not statute-barred when the winding up resolution was passed it did not become so barred by the passage of further time; that a claim which was not statute-barred for the purposes of claiming in the liquidation could not be statute-barred for the purposes of founding a claim under the 1930 Act against the insurer; that, therefore, if the claimant's claim had not been statute-barred at the time of the winding up it had not become statute-barred by the passage of further time thereafter; that, further, it did not matter what provision or combination of provisions of the 1980 Act the claimant relied upon to show that the claim was not statute-barred at the time of the winding up; and that, accordingly, the claimant was entitled to seek to rely upon section 14A

18. At paragraph 28 of his judgment, Lloyd LJ referred to the consideration by the judge below of the decision in *In re Benzon* [1914] 2 Ch 68 where he had considered the meaning of the words "in the bankruptcy" as distinct from the words "outside the bankruptcy". The judge below had said:

> "It seems to me that the judgment of the Court of Appeal in *In re Benzon* is binding authority on me in that there is nothing to indicate that it was based on any false premise. The result of that Court of Appeal decision is that the statute of limitations, having begun to run against the claimant before the

> commencement of the bankruptcy, continues to run, notwithstanding the bankruptcy, in respect of a claim in relation to a fund pursued outside of the bankruptcy."

This led Lloyd LJ to state, at paragraph 36, as follows:

> "How can a single claim, in respect of one cause of action, against one defendant, be barred by limitation for one purpose and not for another? Separate causes of action of one claimant against the same defendant may be treated differently as regards limitation, as may causes of action against two defendants, for example if one defendant goes into bankruptcy or winding-up and another does not, and the claimant may have rights outside the bankruptcy or winding-up as well as inside it, for example a secured creditor who may have to prove for a shortfall. But the claimant in the present case, in respect of each of the six investors whose rights have been assigned to it, sues the single defendant on one cause of action, in tort, for one item of loss. It is difficult to imagine how the plea of limitation would be treated on the statements of case, and indeed how it would be dealt with when giving judgment for the claimant (assuming that it proves its case and gets over the limitation defence on the facts by virtue of section 14(a).
>
> 37. In my judgment Mr Tolley's proposition faces insuperable difficulties. Given that the first stage for a third party such as the claimant is to establish the liability to it of the insured, which is necessarily being administered in insolvency, seems to me that the third party's claim against the insured is one to which the normal principles apply, namely that, if it is not time barred at the commencement of the bankruptcy or winding-up, it does not become time barred by the passage of further time thereafter. I therefore respectively disagree with the judge on this, the main point in the case."

19. Mr Penman relies strongly on this passage as showing the principle to be applied because, he says, there may be cases where the liability of the insurer under the Third Party (Rights against Insurers) Act 2010 (or its predecessor, the 1930 Act) is insufficient to satisfy the judgment with the result that there is a residual claim against the company within the liquidation, as there was in *Financial Services*. He submits that there should therefore be no distinction between that case and the present case purely on the basis that the present case is a personal injury case.

20. In the vast majority of personal injury cases, the liability of the insurance company will fall well within the statutory minimum level of insurance of £2,000,000. Thus there will generally be no difficulty in satisfying the full claim from the funds made available by the insurance company. In that case, the claim can, in my judgment, be seen to be "outside the liquidation" and therefore to be distinguished from the position in *Financial Services*. However, in the rare case where the liability of the insurance company may not be sufficient to satisfy the claim, it could be a condition of the order restoring the company to the register that any claim made by the claimant against the

company is to be limited to the liability of the insurer pursuant to the policy. In that way, the claim can be kept outside the liquidation and therefore distinct from the situation in *Financial Services*.

21. In my judgment, this is also a desirable outcome. It means that a claimant whose claim is otherwise unmeritorious because he acquired the necessary knowledge more than three years before the issue of proceedings and in respect of whom it would be inequitable for the court to exercise its discretion under section 33 of the Limitation Act 1980 (the situation in the present case) would not gain an unexpected and undeserved windfall by virtue of the application of the rule set down in a 19th century case which, it seems to me, was never intended to apply to a case such as the present. Furthermore, in my judgment, the decision of the Court of Appeal in *Financial Services* was never intended to apply to the situation which has arisen in the present case and there was no intention to contradict the decision of the Court of Appeal in *Smith v White Knight Laundry Limited* [2001] EWCA Civ 660, a decision which was not cited in *Financial Services*. In *Smith v White Knight Laundry Limited*, the Court of Appeal held that where the applicant for a restoration order was a prospective claimant in a personal injuries action in circumstances where the claim would otherwise have been statute-barred, the effect of a direction under section 651 of the Companies Act 1985 (the predecessor to section 1030 of the Companies Act 2006) was the same as a grant of relief under section 33 of the Limitation Act 1980 ; and that, since the section 651 direction was made in the absence of the defendant and it was by no means clear that the claimant would succeed if she made an application pursuant to section 33 of the 1980 Act, justice required that the section 651(1) direction be set aside so that the defendant's insurers could be heard on any application the claimant might make pursuant to section 33. It should make no difference whether or not the Company was in liquidation at the time it was dissolved.

22. It is unfortunate that, in the present case, the Defendant company was restored to the Register without notice of the application being given to the Company's insurers who were the ultimate target for the Claimant in making his application for restoration, and that the order was made without, apparently, consideration being given to the resolution of any issue between the Claimant and the Defendant's insurers in relation to a possible defence under the Limitation Act 1980. I would encourage the Rules Committee to give consideration to a change in the rules, requiring such notice to be given to a relevant insurer when such an application is made for restoration.

23. As to the appropriate procedural course in the present case, I could, if necessary, grant the insurers permission to apply in the proceedings which were before the Manchester Business Court for permission to appeal against the order of District Judge Richmond, grant such permission, allow that appeal and overturn the decision to restore the Defendant to the Register on the basis of Judge Owen's adjudication of the merits in relation to the Limitation Act 1980, an adjudication which is not contested and must be taken to have been right. However, Judge Owen QC having taken the course that he did, the simpler course now for me is simply to dismiss this appeal.